Supreme Court, U.S.
FILED

981063 DEC 29 1998

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1998

JOHN D. SHADE,

Petitioner,

-v-

GREAT LAKES DREDGE & DOCK COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

MARVIN I. BARISH, ESQUIRE
Counsel of Record
Marvin I. Barish Law Offices, P.C.
Sixth & Walnut Streets
The Curtis Center
Suite 801
Philadelphia, PA 19106
(215) 923-8900
Attorneys for Petitioner

Appellate Service: Curry & Taylor (800) 222-8738/Appellate@webtv.com

QUESTION PRESENTED FOR REVIEW

Whether in a Jones Act case, when determining whether a maritime employee has the requisite employment-related connection to a vessel in navigation so as to qualify as a seaman and where the issue is whether he is land-based or sea-based should the jury be precluded from considering the total circumstances of that individual's prior employment with the same employer because there was a break in the continuity of the employment.

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutory and Constitutional Provisions Involved	1
Statement of the Case	3
Argument	7
THE CONCLUSION OF THE COURT OF APPEALS IS CONTRARY TO THE LANGUAGE AND SPIRIT OF *CHANDRIS* AND HAS IMPROPERLY FASHIONED A NEW CONCEPT OF RELEVANCY THAT PRECLUDES A JURY'S CONSIDERATION OF A WORKER'S PRIOR HISTORY WITH THE SAME EMPLOYER IN ORDER TO ESTABLISH A SUBSTANTIAL CONNECTION WITH VESSELS IN NAVIGATION UNLESS THAT EMPLOYMENT IS CONTINUOUS. ACCORDINGLY, THE OPINION OF THE THIRD CIRCUIT CONFLICTS WITH ESTABLISHED FEDERAL LAW AND IN LIMITING THE CIRCUMSTANCES UNDER WHICH A WORKER'S PRIOR EMPLOYMENT IS RELEVANT RAISES SERIOUS FEDERAL QUESTIONS WHICH MUST BE RESOLVED BY THIS COURT.	7
Conclusion	18
Appendix	
Circuit Court Opinion	1a
District Court Opinion	28a
Order Denying Petition for Rehearing	29a

TABLE OF AUTHORITIES

CASES

Abshere v. Seacoast Products, 668 F.2d 832 (5th Cir. 1982) 11

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 14

Ardoin v. Jay Ray McDermott & Co., 641 F.2d 277, 280 (5th Cir. 1981) 16

Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983) 11

Chandris v. Latsis, 515 U.S. 347, 115 S.Ct. 2172 (1995) 6, 7, 16

Cox v. Roth, 348 U.S. 207 (1995) 10

Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (3d Cir. 1998) 14

Garrett v. Moore-McCormick Co., 317 U.S. 239 (1942) 17

TABLE OF AUTHORITIES

CASES

Abshere v. Seacoast Products, 668 F.2d 832 (5th Cir. 1982) 11

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 14

Ardoin v. Jay Ray McDermott & Co., 641 F.2d 277, 280 (5th Cir. 1981) 16

Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983) 11

Chandris v. Latsis, 515 U.S. 347, 115 S.Ct. 2172 (1995) 6, 7, 16

Cox v. Roth, 348 U.S. 207 (1995) 10

Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (3d Cir. 1998) 14

Garrett v. Moore-McCormick Co., 317 U.S. 239 (1942) 17

Reeves v. Mobil Dredging Co., 26 F.3d 1247 (3d Cir. 1994) 15, 16

Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500 (1957) 14

Senko v. LaCrosse Dredging Co., 352 U.S. 370 (1957) 13

Sentillies v. Inter-Caribbean Corp., 361 U.S. 107 (1959) 14

Thibodeaux v. Torch, Inc., 858 F.2d 1048 (5th Cir. 1988) 11

STATUTES:

28 U.S.C. § 1254(1). 1

46 U.S.C. §688 1

OTHER AUTHORITIES:

2 Weinstein's Federal Evidence §401.04[4][a], ... 6

Fed.R.Civ.P. 402 9

PETITION FOR WRIT OF CERTIORARI

The petitioner, John D. Shade, petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 3, 1998.

OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Pennsylvania was entered on November 29, 1997, and is reported in the appendix of this petition (App. at 28a). The judgment of the Third Circuit Court of Appeals was entered on September 3, 1998, and is reproduced in the appendix to this petition (App. at 1a). The order of September 30, 1998, denying rehearing is contained in the appendix to this petition (App. at 29a).

STATEMENT OF JURISDICTION

The District Court entered its judgment on November 29, 1997. The Court of Appeals entered its judgment on September 3, 1998. The order denying rehearing was filed September 30, 1998.

This Court's jurisdiction is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 46 U.S.C. §688 - Recovery for injury to or death of seaman

Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

John D. Shade has been employed as a seaman-deckhand aboard vessels in navigation since 1974. All of his work dealt with vessel-related activity that continuously subjected him to the perils of the sea. During most of his maritime career, Shade worked for American Dredging Company. When that company went out of business, Shade's primary employer was Great Lakes. During the four years before his injuries, Shade worked exclusively for Great Lakes, with the exception of the period from March, 1994, to December 8, 1994, when he was employed by Bean-Weeks Dredging Company because Great Lakes was not hiring at the time. While employed at Bean- Weeks, Shade's activity was limited to classical seaman's work continuously subjecting him to the perils of the sea.

In November of 1994, Great Lakes was awarded a contract by the U.S. Army Corps of Engineers to dredge and renourish the beach at Cape May, NJ. On December 8, 1994, his employment with Bean-Weeks terminated and he immediately returned to his regular work with Great Lakes at the Cape May work site. He reported as a deckhand.

Shade was assigned to defendant's anchor barge. This barge permitted Shade and his other crew members to perform those services that were necessary for the performance and completion of the dredging mission. The anchor barge transported a large crane to the various ocean sites in order to lift heavy material such as the submersible pipe, the anchors of the scot's buoy and other off-shore services. In addition to the crane, the anchor barge also transported the welding machine, the submersible pipe, the various anchor balls and buoys as well as all other equipment

necessary for the work of the buli gang. Additionally, the anchor barge was used to transport the workers from shore to their work sites on the ocean, to deliver stores and supplies to the dredge and to engage in the repair of equipment and the construction of alternative submersible pipes to be used in the performance of the job.

Both Shade and his supervisor, Mark Oldham, testified that Shade was employed primarily on the navigable waters off Cape May. In fact, Oldham testified that Shade was performing his work at sea 90 percent of the time that he worked at the Cape May project.

On December 30, 1994, as part of his duties in relation to the submersible line, Shade was on the beach. He was assisting his foreman Oldham in refueling a welding machine, a procedure that required lifting the machine with a front-end loader. While his supervisor Oldham was operating the loader, the raised claw of the loader dropped and severed Shade's thumb. Medical evidence was presented to the jury that Shade basically had no use of the thumb and could not return to seaman's duties. Shade's appearance on the beach was only temporary. Had he not been injured, he would have continued his employment on navigable waters.

A jury trial began on October 14, 1997. During this trial, Great Lakes contended that Shade was not a seaman because at the time of his injury and for a few days before, he had been working on the beach. The trial court appropriately charged:

> If you find the plaintiff's regularly assigned duty required him to divide his work

between vessel and land, you must determine his status as a seaman in the context of all the facts and circumstances of his employment with his employer.

* * *

However, an employee's prior work history with a particular employer does not affect the work activity if the employee was injured on a new assignment with the same employer, or an assignment with different essential duties than his previous one.

* * *

If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position. It is improper to consider prior employments with different employers than the defendant in determining whether plaintiff is a seaman. In deciding whether there is an

> identifiable group of vessels in determining seaman status, the question is whether the vessels are subject to common ownership and control.

Great Lakes did not object to this charge.

At the conclusion of the evidence, the district court submitted a series of special interrogatories to the jury; and on October 21, 1997, the jury found that Shade was a seaman and returned a verdict in his favor in the amount of $870,000.00. Great Lakes appealed.

On September 3, 1998, the Court of Appeals for the Third Circuit reversed. It recognized that there was sufficient evidence to support the jury's finding that Shade was a seaman. However, the Court concluded that only evidence of Shade's present assignment was relevant and admissible to establish the substantial connection to a vessel in navigation required by *Chandris v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172 (1995), and that it was improper for the jury to consider Shade's prior work history with Great Lakes as he did not work continuously for Great Lakes. In reaching this conclusion, the court below added the element of continuous employment to the temporal test for substantial connection to a vessel.[1]

---

[1]The Third Circuit's conclusion that the district judge abused his discretion when he permitted Shade to set forth his general work history in the beginning stages of his testimony is without merit. At the outset, evidence that serves as background information is generally admissible. *See* 2 Weinstein's Federal Evidence §401.04[4][a], pp. 401-36, *et seq.* However, in the context of this case, the admission of

REASON FOR GRANTING THE WRIT

THE CONCLUSION OF THE COURT OF APPEALS IS CONTRARY TO THE LANGUAGE AND SPIRIT OF *CHANDRIS* AND HAS IMPROPERLY FASHIONED A NEW CONCEPT OF RELEVANCY THAT PRECLUDES A JURY'S CONSIDERATION OF A WORKER'S PRIOR HISTORY WITH THE SAME EMPLOYER IN ORDER TO ESTABLISH A SUBSTANTIAL CONNECTION WITH VESSELS IN NAVIGATION UNLESS THAT EMPLOYMENT IS CONTINUOUS. ACCORDINGLY, THE OPINION OF THE THIRD CIRCUIT CONFLICTS WITH ESTABLISHED FEDERAL LAW AND IN LIMITING THE CIRCUMSTANCES UNDER WHICH A WORKER'S PRIOR EMPLOYMENT IS RELEVANT RAISES SERIOUS FEDERAL QUESTIONS WHICH MUST BE RESOLVED BY THIS COURT.

ARGUMENT

In *Chandris v. Latsis*, 515 U.S. 347 (1995), this Court granted certiorari to determine what employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act. The Court concluded that the answer to this query was status based and that the jury should be permitted to consider the total circumstances of an individual's maritime employment

---

Shade's basic work history could not have affected the determination of the jury. The district court charged specifically: "It is improper to consider prior employments with different employers than the defendant in determining whether plaintiff is a seaman."

in order to determine whether he had a sufficient relation to vessels in navigation and the perils attendant thereon.

In *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535 (1997), this Court granted certiorari in order to clarify under which circumstances a worker may establish seaman status based on the substantiality of his connection to an identifiable group of vessels. The Court concluded that in order to qualify for Jones Act status, the vessels must be subject to common ownership or control. A common hiring hall was found not to meet this requirement even though the employers obtained all their employees from this hall. Further, the Court found that Papai, throughout his employment in question, did not perform any sea-going activity, nor had he performed any sea-going activity in his prior employments with Harbor Tug. This Court emphasized that its ruling did not deal with a situation where the employee was hired to perform sea-going work during the employment in question.

In this case, we request this Court to grant certiorari to determine whether an employee's sea-going work history with an identifiable group of vessels under common ownership and control is relevant to the determination of Jones Act seaman status where the employee was hired to perform sea-going work during the employment in question but where the employee's connection to the identifiable fleet lacked continuity because of a break in employment during which the employee was forced to seek sea-going employment with another dredging company as Great Lakes was not hiring during this period.

The court below ruled that under these circumstances, only evidence of the employee's work assignment at the time

of his injury was relevant and admissible to establish a substantial connection to a vessel in navigation. The Court of Appeals ruled that the district court abused its discretion by allowing the employee's prior work history with the same employer into evidence because the employee did not maintain a continuous employment relationship with the company.[2]

We seek certiorari so that this Court can rule on this important federal issue which if not clarified will foster the mischief that this Court sought to avoid in *Chandris* and *Harbor Tug*. The Court's requirement of continuous employment in order to allow evidence of prior sea-going service with the same employer is both contrary to the teachings of this Court and at odds with the reality of this industry. The overwhelming portion of the maritime industry operates on a job assignment system rather than a permanent employment system. This ruling would permit a maritime worker who had continuous employment with one employer to introduce evidence of his prior employment with that employer so as to enable a jury to evaluate the employment-related connection of the maritime worker to a vessel in navigation. On the other hand, the appellate court's requirement of continuous employment would preclude those maritime workers who obtained employment on a job

---

[2]Contrary to the statement of the Third Circuit, Great Lakes at no time objected to the use of Shade's prior work history introduced for the purpose of establishing substantiality and duration of employment. In fact, Great Lakes in its brief supporting its motion for new trial agreed that this evidence was relevant on this issue. The Court's reason for review, *i.e.*, the fact that Great Lakes objected to the prior employment evidence as not being relevant under Fed.R.Civ.P. 402 (App. at 18a) and its conclusion that the district court abused its discretion, has no basis in the record.

assignment basis from introducing the same evidence. Thus, an employee who performed all of his work at sea but did not do so continuously for a single employer could, in a case such as this, be found exempt from Jones Act coverage. Query, whether by seeking work rather than remaining home during the period of unemployment Shade deprived himself of that evidence that would permit a jury to conclude that he had the temporal relationship necessary to sustain the "more enduring relationship contemplated in the jurisprudence." *Chandris*, 515 U.S. at 363. Similarly, the rationale of the Third Circuit would have serious impact upon the application of the Jones Act as employers could manipulate their work force so as to preclude the continuity of employment required by the Third Circuit.

Because the Jones Act is to be liberally construed so as not to preclude workers who have performed the majority of their work in vessel-related service on navigable waters, the rationale of the Third Circuit cannot stand. *See Cox v. Roth*, 348 U.S. 207 (1995). The ultimate inquiry required by *Chandris* is whether or not an employee had a sufficient relationship to vessels in navigation and the perils attendant thereto. It is for this reason that this Court concluded that in determining whether a worker is land based or sea based, the jury should be permitted to consider the total circumstances of his maritime employment. The question of continuity of employment was never regarded as part of the equation to determine the status of the employee. *See Landry v. Amaco Production Co.*, 595 F.2d 1070 (5th Cir. 1979) (in order to establish seaman status, a claimant must meet a threshold test of showing sufficient contact with water-borne or vessel-related acti . ity). *See further Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983).

These cases added a temporal gloss to the Jones Act inquiry. If an employee's regular duties required him to divide his time between vessel and land, his status should be determined in the context of his entire employment with his employer with reference to the nature and location of his occupation taken as a whole. For a claimant to satisfy the substantial work prong initially set forth in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), it must be shown that he performed a significant part of his work aboard vessels at least with some degree of regularity. Thus, the fact that an anchor handling crew worked on 25 separate vessels not owned by the employer from an anchor barge similarly not owned by their employer did not preclude Jones Act coverage where 90 percent of their work was performed at sea even though the injury occurred on shore in a one-vehicle accident. *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983); *Thibodeaux v. Torch, Inc.*, 858 F.2d 1048 (5th Cir. 1988). *Compare Abshere v. Seacoast Products*, 668 F.2d 832 (5th Cir. 1982) (90-95 percent work on 21 vessels - seaman); *Landry, supra, (70 percent work vessel-related - seaman)*, with *Guidry v. Southern Louisiana Contractors, Inc.*, 614 F.2d 447 (5th Cir. 1980) (20-25 percent work on vessels - not seaman); *Keener v. Transworld Drilling Co.*, 468 F.2d 789 (5th Cir. 1972) (20-25 percent of work on one vessel - not seaman).

As there is no precise delineation of that quantum of duties which when performed at sea will make the employee a seaman, there is no bright line test to be applied in determining the frequency and regularity of performance which must be shown in order to claim that status. Because of this, *Chandris* requires a jury to consider all circumstances of plaintiff's employment in order to determine the quantum of vessel-related activities to the claimant's total

responsibility. *See Chandris, supra; Longmire v. Sea Drilling Corp* , 610 F.2d 1342 (5th Cir. 1980).

Thus, this Court stated that the test of substantiality and duration is to be "determined by reference to the period covered by the Jones Act plaintiff's maritime employment."

> The jury should be permitted, when determining whether a maritime employee has the requisite employment-related connection to a vessel in navigation to qualify as a member of the vessel's crew to consider all relevant circumstances bearing on the two elements outline above. ... In our view, 'the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon.

Chandris, supra, at 369.

Of course, when a maritime worker's basic assignment changes so that he is no longer working at sea, his seaman status may change as well. However, the type of change of assignment contemplated by this Court was:

> [f]or example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a result and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea.

Chandris, *supra*, at 372.

In such cases, the employee is entitled to have the substantiality of his vessel-related work made on the basis of his new activities in his new position. *Patton-Tully Transport Co. v. Ratliff*, 797 F.2d 206 (5th Cir. 1986). However, there is nothing in this concept that suggests that one who has always been employed at sea can be foreclosed from Jones Act coverage because of a break in employment necessitated by the fact that his employer was not hiring.

Perhaps the greatest mischief of the Court of Appeals was its invasion of the province of the jury. The authority

teaches that under the Jones Act, the term "seaman" has a variety of meanings that only a jury or trier of fact can determine its application in the circumstances of a particular case. Because the answer to the question of seaman status is fact-intensive, this Court has consigned the issue to the jury. Thus, in *Senko v. LaCrosse Dredging Co.*, 352 U.S. 370 (1957), Mr. Justice Reed stated at p. 374:

> We believe, however, that our decision in *South Chicago Co. v. Bassett, supra*, has not been fully understood. Our holding there that the determination of whether an injured person was a "member of a crew" is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate.

See also McDermott v. International, Inc. v. Wilander, 428 U.S. 337 (1991); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Clearly, the issue of whether or not there is a new assignment with substantially different essential work duties is for the jury. *Guidry v. Southern Louisiana Contractors, Inc.*, 614 F.2d 447 (5th Cir. 1980). In the case at bar, Shade and his witnesses testified that the work that he was

performing for Great Lakes at the Cape May site was precisely the same work as he had performed on his previous assignments with Great Lakes. It is axiomatic that in reviewing a jury's conclusion, it must be assumed that the jury followed the charge of the court. Based upon this charge, the jury could have decided that the new assignment did not entail essentially different work duties than his previous assignments with the same employer, or the jury could have concluded the contrary, ignored the prior employment, but still found Shade to be a seaman. *See Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252 (3d Cir. 1998). By ruling as a matter of law that Shade's assignment by Great Lakes to the Cape May project was a new assignment with substantially different duties because Shade's employment with Great Lakes had been interrupted, the Third Circuit nullified the conclusion of the jury and created a new test for seaman status. This cannot be condoned. *See Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957); *Sentillies v. Inter-Caribbean Corp.*, 361 U.S. 107 (1959). One must question how a jury is to determine if an employee's present work assignment is one with different essential duties than the prior assignment if evidence of the employee's prior duties is precluded.

The lower court looks to *Harbor Tug & Barge Co. v. Papai*, *supra*, as authorizing its conclusion here. Papai had received various assignments with a number of different employers through a central union hiring hall. In an attempt to establish a substantial connection to a vessel in navigation, Papai introduced evidence of his prior employment with these different employers as well as his prior employment with Harbor Tug. After rejecting the argument that his employments out of the union hall were assignments for the same employer, the court examined Papai's specific

employments with Harbor Tug. It concluded that Papai's employment at the time of his injury was not of a sea-going nature and that his prior employments with Harbor Tug were non-sea-going. The court rightfully concluded that Papai's prior non-sea-going activities could not, when combined with his non-sea-going employment at the time of this injury, afford him seaman status. That is not the case here. All of Shade's prior employment with Great Lakes was of a sea-going nature and he was engaged in seaman's work during his work at the Cape May site.

This Court in *Harbor Tug* made it clear that the holding in that case does not apply to one who is actually performing sea-going work during the assignment in question. In this regard, the Court stated:

> This is not a case where the employee was hired to perform seagoing work during the employment in question, however brief, and we need not consider here the consequences of such an employment.

Harbor Tug, supra, at 1542.

Similarly, the court's reliance upon *Reeves v. Mobil Dredging Co.*, 26 F.3d 1247 (3d Cir. 1994), is misplaced. Reeves, who was injured while employed by Mobil Dredging upon a man-made lake, landlocked within the Commonwealth of Pennsylvania, with no waterways connecting it to any other state or to navigable waters, attempted to create Jones Act status by arguing that his prior employment with Great Lakes rendered him a seaman. The

court held that plaintiff's prior employment with another employer was not relevant to the issue of Jones Act status. There is nothing in *Reeves* that suggests a narrowing of the orbit of Jones Act coverage in the case at bar. Certainly, *Reeves* does not stand for the proposition that one's prior work history is irrelevant because of the absence of a continuous work relationship.

The assertion of the court below that the exclusion of evidence of prior maritime employment with the same employer is consistent with the Fleet Seaman's Doctrine has no support. There is nothing about the expanding concept of the Fleet Seaman's Doctrine that limits the scope of jury inquiry by precluding Shade's prior maritime work history to cases where the employment is continuous. In *Ardoin v. Jay Ray McDermott & Co.*, 641 F.2d 277, 280 (5th Cir. 1981), the court stated that "[o]ur subsequent decisions make it clear that the *Robison* test with its broad concept of seaman status is to be used not only in deciding whether a case goes to the jury in a Jones Act dispute, but also in delimiting the power of the fact finder to deny or confer such status."

As the decision of the court below delimited the power of the fact finder to deny or confer seaman status, it is in conflict with the Fleet Seaman's Doctrine, the purpose of which was to expand the availability of the Jones Act and not to limit it. The conclusion of the court below invades the province of the jury, is contrary to the spirit and language of *Chandris*, and contravenes this Court's requirement that there be a uniform application of federal law in order to protect the class of workers that a statute was designed to cover. *See Mondou v. New York, N.H. & H. R.R. Co.*, 223 U.S. 1 (1912); *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942); *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970).

We request this Court to grant certiorari in order to resolve this important issue of federal law.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

MARVIN I. BARISH LAW OFFICES, P.C.
Marvin I. Barish, Esquire
Suite 801 - The Curtis Center
Sixth and Walnut Streets
Philadelphia, PA 19106
(215) 923-8900

(any footnotes trail opinion)
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN D. SHADE

v.

GREAT LAKES DREDGE & DOCK COMPANY,

Appellant

No. 97-2023

July 30, 1998, Argued
September 3, 1998, Filed

COUNSEL: Robert B. White, Jr. (argued), Rapp, White, Janssen & German, P.C., 1800 John F. Kennedy Boulevard, Suite 500, Philadelphia, PA 19103, Attorneys for Appellant.

Marvin I. Barish (argued), Marvin I. Barish Law Offices, P.C., Sixth & Walnut Streets, The Curtis Center, Suite 801, Philadelphia, PA 19106, Attorney for Appellee.

JUDGES: BEFORE: GREENBERG, SCIRICA, and MCKEE, Circuit Judges.

OPINION BY: GREENBERG

OPINION: OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. JURISDICTION

Great Lakes Dredge & Dock Company appeals from a final judgment entered in favor of appellee, John D. Shade, on October 22, 1997, pursuant to a jury verdict for Shade in the amount of $ 870,000, and from the denial of its renewed motion to alter or amend the judgment, or, in the alternative, for a new trial entered on November 19, 1997. The district court had jurisdiction over this case under 28 U.S.C. § 1331, and this court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. FACTUAL AND PROCEDURAL HISTORY

The U.S. Army Corps of Engineers awarded Great Lakes a contract to dredge and renourish the beach at Cape May, New Jersey, which Great Lakes began performing on November 12, 1994. This project consisted of removing sand from the ocean floor at offshore locations and transferring the sand to the beach through 6600 feet of steel pipe, known as the submersible line. See app. at 637-40. The dredge Long Island removed the sand from the ocean floor; and once its hopper compartments were full, the tug Conlon propelled the dredge to a self-contained offshore transfer station buoy ("scots buoy"), a large round floating buoy secured by four anchors. See id. at 337, 689. In order to transport the sand to the beach, the dredge would secure itself to a pipe attached to the scots buoy which in turn was connected to the submersible line. The dredge then would pump its load of sand into the pipe and through the submersible line. Upon reaching the beach, the

submersible line ended at a "Y" valve. This valve, which controlled the flow of the sand, connected the submersible line to an additional line, known as the shore line, extending in both directions along the beach parallel to the ocean. As the sand flowed out of either end of the shore line, bulldozers positioned the sand on the beach according to a predetermined plan.

Shade arrived at the Cape May worksite on the night of December 8, 1994, and began to work for Great Lakes at the site on December 9, 1994. See id. at 472. Since 1974, Shade had been employed by various companies to assist in such dredging projects; and in the four years prior to his injury, the majority of his work had been with Great Lakes. See id. at 468-69. Shade received his work assignments through his union, Local 25, Marine Division, International Union of Operating Engineers, AFL-CIO. When he was unemployed, Shade would place his name on the out-of-work list until Local 25 assigned him to a new job. See id. at 346-48, 519-20.

Great Lakes previously employed Shade from September 1992 until February 1994. See id. at 54-55, 509-10. However, beginning in March 1994, Shade worked for Bean-Weeks Joint Venture, another dredging contractor, as a deckhand. See id. at 55, 510. Bean-Weeks subsequently fired Shade, and he remained without work until Great Lakes hired him for the Cape May job.

Great Lakes asserted that it hired Shade for Cape May as a shoreman, see id. at 648, pursuant to its contract with Local 25 which mandated the hiring of a shoreman for this type of

job. See id. at 69, 684-87. In fact, Great Lakes' superintendent, David P. Rappe, and the Local 25 union steward, Cecil C. Jackson, Sr., both testified that Great Lakes hired Shade as a shoreman. See id. at 687, 794; see also id. at 648 (testimony of deck captain James D. Joyner), 772-73 (testimony of shoreman Joseph H. Gurganus).

Shade, on the other hand, contended that Great Lakes hired him as a deckhand assigned to the anchor barge 110, which assisted in the dredging operation, see id. at 479, and that the shore gang was already in place when he arrived to work at Cape May. See id. at 472. Both Shade and his supervisor, Mark Oldham, testified that he was employed primarily on the navigable waters off Cape May. See id. at 316-17, 473-84. In fact, Oldham testified that Shade was on the water 90% of the time that he worked at the Cape May project. See id. at 316-17.

When Shade arrived at Cape May, the submersible line had been laid, the scots buoy was in place, and the Long Island had begun to dig the first portion of sand from the ocean floor. See id. at 473, 642-43, 681-83, 793-94. The dredge filled its hoppers and connected to the scots buoy, but it was not able to pump the sand to the beach because of a hole in the submersible line. See id. at 157. As a result, from December 9th, when Shade began to work at Cape May, until the early morning hours of December 13th, Shade worked on the water assisting in the repair of the submersible line, see id. at 690-92, while assigned to anchor barge 110. See id. at 473-75.

After the workers completed the repair of the submersible line, the Long Island once again had the capacity to pump

sand to the beach. However, between December 13th and December 30th, the dredge only operated from the evening of December 19th until December 22nd and from the evening of December 25th until December 30th because of poor weather conditions. See id. at 249-66, 694-99. Great Lakes presented evidence that during the periods of bad weather, Shade remained on the beach, assisting welders and waiting on standby in case the weather cleared. See id. at 601-02, 699-700, 745-46. Shade, on the other hand, contended that during poor weather he would work in the harbor which was protected from the rough seas. See id. at 311-14. For instance, Shade testified that he helped construct a second submersible line, see id. at 480, and assisted in repairing the scots buoy. See id. at 558-59; see also id. at 305-15 (testimony of Oldham).

Great Lakes offered testimony that when the dredge was able to pump sand to the beach, Shade performed the work of a shoreman on the beach. See id. at 695-99. For example, Shade assisted welders in securing the shore line, operated the "Y" valve, and put fuel in welding machines. See id. at 536-37, 769. Shade disputed Great Lakes' account of his work between December 19th and December 22nd, and testified that he worked on the water during that period. See id. at 556. However, he did not dispute that he primarily worked on the beach performing these shore based duties from December 25th until December 30th. See id.

While working on the beach on December 30th, Shade assisted Oldham in refueling a welding machine, a procedure which required lifting the machine with a front-end loader. See id. at 485-87. While Oldham was operating the loader, the

raised claw of the loader dropped unexpectedly and severed Shade's thumb. See id. at 486-88. Shade testified that even though doctors were able to reattach his thumb, see id. at 491, he basically has no use of the thumb, see id. at 501-02, and could not return to work in his prior capacity. See id. at 502-03.

After initially receiving benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. ("LHWCA"), Shade filed a complaint against Great Lakes on January 31, 1997, seeking damages under the Jones Act, 46 U.S.C. app. § 688(a), and the general maritime law doctrine of unseaworthiness. On September 8, 1997, Great Lakes filed a motion for summary judgment on the ground that Shade was not a seaman. The district court denied this motion without opinion on September 24, 1997. On October 7, 1997, Great Lakes filed a motion in limine to preclude testimony at trial regarding Shade's prior employment with Great Lakes. The district court, however, deferred ruling on the motion and at the trial ultimately permitted Shade to introduce evidence of his prior employment. See app. at 54-55, 509-10.

A jury trial began on October 14, 1997, solely on the Jones Act claim. At the conclusion of the presentation of Shade's evidence, Great Lakes moved under Fed. R. Civ. P. 50 for a judgment as a matter of law on the ground that the evidence did not establish that Shade was a seaman at the time of his injury. See app. at 41, 589. However, the district court deferred ruling on that motion. See id. at 589. Great Lakes renewed its Rule 50 motion at the conclusion of all of the evidence, see id. at 45, 844; and again, the district court deferred its ruling. See id. at 844.

The district court submitted a series of special interrogatories to the jury; and on October 21, 1997, the jury found that Shade was a seaman, and returned a verdict in his favor in the amount of $ 870,000. See id. at 946-47. Pursuant to this verdict, the district court entered judgment against Great Lakes on October 22, 1997. See id. at 7. Great Lakes subsequently filed a renewed motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 50(b), or, in the alternative, for a new trial under Fed. R. Civ. P. 59. See app. at 7. However, the district court denied this motion on November 19, 1997, and Great Lakes filed its timely notice of appeal on December 18, 1997. See id. at 7, 9.

III. DISCUSSION

A. Jones Act Seaman Status

The Jones Act provides that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury." 46 U.S.C. app. § 688(a). However, the Jones Act does not define the critical term "seaman" and thus "leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection." Chandris, Inc. v. Latsis, 515 U.S. 347, 355, 115 S. Ct. 2172, 2183, 132 L. Ed. 2d 314 (1995). In a recent series of opinions, the Supreme Court has clarified this definition and has provided guidance as to how courts are to interpret this key term. See Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 117 S. Ct. 1535, 137 L. Ed. 2d 800 (1997); Chandris, 515 U.S. 347, 115 S. Ct. 2172, 132 L. Ed. 2d 314; Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 112 S.

Ct. 486, 116 L. Ed. 2d 405 (1991); McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991).

In developing a test for seaman status, the Court noted that prior cases recognized "a fundamental distinction between land-based and sea-based maritime employees." Chandris, 515 U.S. at 359, 115 S. Ct. at 2185. In enunciating this difference, the Court has focused "on the nature of the seaman's service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters," id. at 359-60, 115 S. Ct. at 2185, and not on the situs of injury, because "land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore." Id. at 361, 115 S. Ct. at 2186; see also Wilander, 498 U.S. at 355, 111 S. Ct. at 817 ("The key to seaman status . . . is employment-related connection to a vessel in navigation."). The rule as developed by the Supreme Court furthers the important goal of ensuring that a worker does "not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured." Chandris, 515 U.S. at 363, 115 S. Ct. at 2187.

From these basic principles, the Court in Chandris set forth a two-part test to determine if an individual is entitled to Jones Act protection as a seaman:

> First, as we emphasized in Wilander, 'an employee's duties must "contribute to the function

> of the vessel or to the accomplishment of its mission.' " The Jones Act's protections, like the other admiralty protections for seamen, only extend to those maritime employees who do the ship's work. . . .
>
> Second, . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and nature.

Id. at 368, 115 S. Ct. at 2190 (citations omitted). The Court also noted that although "seaman status is not merely a temporal concept, . . . it necessarily includes a temporal element." Id. at 371, 115 S. Ct. at 2191. In fact, both portions of the Chandris test contain such an element, because a court must determine how broad a time period to consider when evaluating both an employee's duties and his or her connection to a vessel in navigation.[1]

In its appeal, Great Lakes focuses on this temporal concept. Specifically, Great Lakes argues that in evaluating an employee's duties under the initial prong of the seaman status test, the fact-finder must consider only the activities of an employee at the time of his or her injury. Great Lakes maintains that under this interpretation it is entitled to a judgment as a matter of law, because it contends that Shade was not acting as a seaman at the time of his injury. Alternatively, with respect to the latter portion of the seaman status test, Great Lakes asserts that only evidence regarding the employee's present assignment with his

or her current employer is relevant and admissible to establish a substantial connection to a vessel in navigation. Thus, Great Lakes argues that if it does not receive a judgment as a matter of law, it is entitled to a new trial because the district court permitted Shade to introduce evidence regarding his prior employment history.

After considering these arguments, we hold that Great Lakes is not entitled to a judgment as a matter of law with respect to Shade's seaman status, because Shade presented sufficient evidence to create an issue of fact for the jury to consider. However, we will reverse the judgment entered against Great Lakes, and remand this case to the district court for a new trial, because the district court abused its discretion to admit evidence regarding Shade's prior employment history.[2]

B. Duties Of The Employee

Under the first portion of the Chandris seaman status test, an employee must demonstrate that his or her duties " 'contribute to the function of the vessel or to the accomplishment of its mission.' " 515 U.S. at 368, 115 S. Ct. at 2190 (citation omitted). In satisfying this requirement, the seaman does not have to aid the vessel in navigation,see Wilander, 498 U.S. at 353, 111 S. Ct. at 816; rather, the employee must merely "perform the work of the vessel." Id. at 355, 111 S. Ct. at 817.[3] While this part of the Chandris test does not contain any express time component, such an element is implied, because a court must determine how broad a time period to consider when evaluating an employee's duties. Great Lakes argues for a narrow time limitation, stating that a court is to determine the

seaman status of an employee solely based on "the activity in which he was engaged at the time of injury." Desper v. Starved Rock Ferry Co., 342 U.S. 187, 190, 72 S. Ct. 216, 218, 96 L. Ed. 205 (1952); see also Heise v. Fishing Co., 79 F.3d 903, 906-07 (9th Cir. 1996) ("The fact that if Heise performed well he might be hired to work on the ship when it left Seward if there were jobs available does not change his land-based status at the time the injury occurred." (emphasis added)). Applying this standard to the facts in this case, Great Lakes contends that it is entitled to a judgment as a matter of law, because Shade was ashore assisting in the refueling of a welding machine when he was injured.

The question of seaman status is often "fact specific," and "if reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury." Wilander, 498 U.S. at 356, 111 S. Ct. at 818. However, "a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." Id. This court utilizes a plenary standard to review a grant or denial of a judgment as a matter of law. See Salas v. Wang, 846 F.2d 897, 902 (3d Cir. 1988). A court should grant such a motion only "if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993).

Although the contours of the seaman status test remain difficult to apply, the Supreme Court has provided a number of

relevant principles to guide our determination of this issue. First, the Court has emphasized that its status-based approach to the definition of the term seaman "determines Jones Act coverage without regard to the precise activity in which the worker is engaged at the time of the injury." Chandris, 515 U.S. at 358, 115 S. Ct. at 2185; see also id. at 363, 115 S. Ct. at 2187 ("Courts should not employ 'a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated in the jurisprudence.' " (quoting Easley v. Southern Shipbuilding Corp., 965 F.2d 1, 5 (5th Cir. 1992))). By not focusing exclusively on the activity of the employee at the time of injury, courts prevent a worker from oscillating "between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured." Id. at 363, 115 S. Ct. at 2187.

For instance, in Thibodeaux v. Torch, Inc., 858 F.2d 1048, 1049 (5th Cir. 1988), the plaintiff sued under the Jones Act for injuries he sustained while working ashore. The employer argued that it was entitled to summary judgment, because the plaintiff 's specific activities at the moment of his accident were not the work of a seaman, but rather were "traditional" duties of a longshoreman. Id. at 1050. The Court of Appeals for the Fifth Circuit rejected the employer's position and held that the specific activity at the time of injury was "only one factor" in the analysis of the employee's Jones Act seaman status. Id. at 1051; see also Smith v. Odom Offshore Surveys, Inc., 791 F.2d 411, 415 (5th Cir. 1986); Savoie v. Otto Candies, Inc. , 692 F.2d 363, 365 (5th Cir. 1982); Guidry v. South La. Contractors, Inc., 614 F.2d 447, 453 (1980); Higginbotham v. Mobil Oil Corp., 545 F.2d 422 (5th Cir. 1977), rev'd on other

grounds, 436 U.S. 618, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978). Thus, contrary to Great Lakes' position, the employee's specific activity at the time of his or her injury is not dispositive of the issue of seaman status.

Second, although an examination based solely on the specific activity at the time of injury is too narrow, the Supreme Court also has cautioned against too broad of a perspective in examining an employee's duties. In evaluating the duties of an employee under the seaman status test, courts should not consider an employee's entire work history, but must consider only the nature of the employee's basic job assignment as it existed at the time of injury. After all, as the Court has stated, "when a maritime worker's basic assignment changes, his seaman status may change as well." Chandris, 515 U.S. at 372, 115 S. Ct. at 2191. To illustrate this holding, the Court explained:

> For example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea.

Id. at 372, 115 S. Ct. at 2191. Thus, while a court must not concentrate exclusively on the employee's specific activity at the time of injury, a court should limit its examination of the employee's duties to the employee's basic job assignment as it existed at the time of injury.

Applying these principles to the present appeal, we cannot say that Great Lakes is entitled to a judgment as a matter of law. Although Shade was on shore assisting in the refueling of a welding machine when he was injured, this activity cannot be the sole determining factor to resolve whether Shade was a seaman. Instead, we must view Shade's status in the larger context of his employment-related duties. In deciding which duties to consider, a reasonable juror could conclude that Shade's entire performance at the Cape May job consisted of a single assignment, because his duties remained fairly constant during the pendency of that dredging operation. Under this broader analysis, Shade presented sufficient evidence such that a reasonable jury could determine that his duties during the Cape May job contributed to the function of a vessel or to the accomplishment of its mission. While working at Cape May, Shade spent a considerable amount of his time at the beginning of his employment working on the water with the anchor barge 110 to repair the submersible line. See app. at 473-75, 690-92. Beyond this initial placement, Shade presented evidence at trial that he spent significant time on the water as a deckhand on a vessel in navigation perfor ming his job responsibilities. See id. at 311-14, 316-17, 473-84. Additionally, even Shade's duties on the beach were not unrelated to the work of a vessel in navigation; instead, they contributed to the purpose of the dredging operation. Viewing this evidence in a light most favorable to Shade, a

reasonable juror could find that Shade's job responsibilities at Cape May consisted of a single job assignment and contributed to the function of a vessel in navigation, thereby satisfying the first requirement of the Chandris test. Thus, because Shade presented sufficient evidence for a reasonable juror to find in his favor, the district court correctly denied Great Lakes' motion for a judgment as a matter of law.[4]

C. Connection To A Vessel

Under the second part of the Chandris seaman status test, an employee must demonstrate that he or she has "a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and nature." 515 U.S. at 368, 115 S. Ct. at 2190. Typically, this requirement is fulfilled by examining the employee's connection with the vessel to which he or she was assigned at the time of his or her injury. However, in certain circumstances, this connection might not be sufficient to meet the substantiality requirement of the seaman status test, even though the employee performs traditional seaman activities on a regular and continuous basis. For example, the employee's job responsibilities might require performance on a number of different vessels, rather than permitting a permanent connection to one vessel. Confronted with this problem, courts have enabled employees to fulfill the seaman status test by demonstrating that they are assigned to a fleet of vessels, rather than to only one vessel, under a doctrine known as the "Fleet Seaman Doctrine." See, e.g., Reeves v. Mobile Dredging & Pumping Co., 26 F.3d 1247, 1253-55 (3d Cir. 1994) (describing the development of the doctrine). In fact, the Chandris test contemplates this doctrine,

because it expressly permits an employee to demonstrate a connection not only "to a vessel in navigation," but also "to an identifiable group of such vessels." 515 U.S. at 368, 115 S. Ct. at 2190. By permitting this aggregation, the Fleet Seaman Doctrine thus ensures that a seaman receives Jones Act coverage even though he or she is not assigned permanently to a specific vessel, but instead regularly performs seaman's work on different vessels. See Gizoni v. Southwest Marine Inc., 56 F.3d 1138, 1141 (9th Cir. 1995) ("Under the fleet seaman doctrine, one can acquire 'seaman' status through permanent assignment to a group of vessels under common ownership or control.").

For instance, in Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523, 528 (5th Cir. 1960), John Braniff worked as the "Superintende[illegible]n charge of all maintenance, repair and overhaul work" for his employer. Id. at 525. In performing this job, he would travel from vessel to vessel, but would be stationed only temporarily at each vessel. Braniff subsequently drowned while repairing a machine on one of his employer's ferries. See id. Based on his limited contact with the ferry, Braniff could not establish a substantial connection to a single vessel in navigation even though his job required him to perform seaman's duties on a regular and ongoing basis. In holding that Braniff could be a seaman under the Jones Act, the Court of Appeals for the Fifth Circuit permitted an aggregation of Braniff 's connections to the other vessels in the fleet beyond the single ferry he worked on immediately prior to his death, because he was " 'assigned permanently' " to those vessels and performed " 'a substantial part of his work on the' several specified 'vessel(s).' " Id. at 528 (citing Offshore Co. v. Robison, 266 F.2d 769, 779 (5th Cir. 1959)).

We first considered the Fleet Seaman Doctrine in Reeves, 26 F.3d at 1256; and after determining that "the doctrine comports well with and flows logically from Supreme Court precedent," we adopted the doctrine as "the rule of law in this circuit in analyzing Jones Act cases." Id. We held that "the Fleet Seaman Doctrine in our view applies to an employee, one who is predominantly assigned by his employer to a navigable vessel, but who occasionally is assigned by that same employer to non-navigable vessels. It would also apply to one who is assigned to a number of navigable vessels and spends some time on shore, as in Braniff." Id. Thus, we adopted the doctrine to afford Jones Act protection to these types of employees, because "stripping seaman status from such an employee, or allowing that same employee to oscillate between seaman and non-seaman status . . . would be a travesty of justice." Id.

In the present case, Shade had worked as a deckhand since 1974. See app. at 468. From September 1992 until February 1994, Great Lakes employed Shade as a deckhand. See id. at 54-55, 509-10. However, beginning in March 1994, Shade worked for Bean-Weeks. See id. at 55, 510. Great Lakes did not re-employ Shade until December 1994 for the Cape May job. See id. at 472. During trial, Shade sought to introduce evidence regarding his employment history under the Fleet Seaman Doctrine in order to satisfy the substantiality requirement of the Chandris seaman status test. Over the objection of Great Lakes, the district court permitted Shade to offer two types of prior employment evidence. First, Shade introduced a general account of his work history, with Shade testifying that he had been working on the water since 1974, see id. at 468, and had been a deckhand "all my life," id. at 479, and with three other

witnesses testifying that Shade had been a deckhand throughout his career. See id. at 617 (testimony of Thomas E. Chandler), 660-61 (testimony of Joyner), 809 (testimony of Jackson). Second, the district court admitted specific evidence regarding Shade's work history as a deckhand for Great Lakes from September 1992 until February 1994. See id. at 54-55, 468-69, 842.

In its appeal, Great Lakes maintains that it is entitled to a new trial because this prior employment evidence was not relevant to the determination of Shade's seaman status and thus should not have been admitted under Fed. R. Civ. P. 402. n5 We exercise an abuse of discretion standard to review "a denial of a request for a new trial based on the district court's alleged error in ruling on the admissibility of evidence." Affiliated Mfrs., Inc. v. Aluminum Co. of America, 56 F.3d 521, 525 (3d Cir. 1995) (citing Lippay v. Christos, 996 F.2d 1490, 1496 (3d Cir. 1993)). However, where "the district court's decision rests on the application of legal precepts, we exercise plenary review." Failla v. City of Passaic, 146 F.3d 149, 153 (3d Cir. 1998). We will grant Great Lakes a new trial, because we hold that the district court abused its discretion in admitting evidence regarding Shade's prior work history.[6]

Even though the Fleet Seaman Doctrine permits an employee to aggregate contacts with multiple vessels, it is clear that these contacts must have occurred with vessels owned or controlled by the same employer. As the Supreme Court has stated, "considering prior employments with independent employers in making the seaman status inquiry would undermine 'the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act . . . before a

particular work day begins.' " Harbor Tug, 117 S. Ct. at 1541 (quoting Chandris, 515 U.S. at 363, 115 S. Ct. at 2187). The Court held that without such a rule "there would be no principled basis for limiting which prior employments are considered for determining seaman status." Id.; see also Reeves, 26 F.3d at 1257 (rejecting an attempt to introduce evidence of a prior employment with another employer under the Fleet Seaman Doctrine because the prior employment "was simply unrelated" to his present job).

When introducing evidence concerning his general work history, Shade and the other witnesses did not state with any specificity who employed him during his work career. However, undoubtedly at least a portion of this evidence concerned employment with employers other than Great Lakes. For instance, Shade testified that he worked for Bea. Weeks during a portion of 1994; and Shade provided evidence that out of his twenty year career, he worked for Great Lakes during the Cape May job and between September 1992 and February 1994. From this evidence, it is reasonable to conclude that this general work history evidence involved other employers beyond Great Lakes. Thus, because the evidence of Shade's general work history apparently referred to employment with independent employers, this testimony clearly was irrelevant to the determination of Shade's seaman status, and the district court abused its discretion to have permitted the jury to consider it. [7]

The admission of evidence concerning Shade's specific work history with Great Lakes poses a more difficult question. Typically, an employee introducing evidence of connections to other vessels in an employer's fleet under the Fleet Seaman

Doctrine has worked for the same employer on a continual, uninterrupted basis. See, e.g., Braniff, 280 F.2d at 525-26. Shade's connections to other vessels in Great Lakes' fleet, however, did not concern a single employment period. Instead, Shade presented evidence of two distinct employment periods with Great Lakes in order to establish a substantial connection to a vessel in navigation: his final employment with Great Lakes from December 9, 1994, until December 30, 1994, and his previous employment with the company from September 1992 until February 1994. Between these two employment periods, Shade did not work for Great Lakes, and he had no connection to Great Lakes or the vessels in its fleet. Rather, Bean-Weeks employed him. Thus, in this unusual situation, we must determine whether the Fleet Seaman Doctrine permits Shade to aggregate his prior Assignments with Great Lakes and his work for the company at the Cape May job to establish a substantial connection to a vessel in navigation, even though he was not employed continuously by Great Lakes.

The Supreme Court's consideration of the substantiality prong of the Chandris seaman status test in Harbor Tug, 520 U.S. 548, 117 S. Ct. 1535, 137 L. Ed. 2d 800, provides some guidance to resolve this issue. In that case, John Papai, an employee of Harbor Tug & Barge Company, was injured while painting a tugboat. See Harbor Tug, 117 S. Ct. at 1538. During the 2-1/4 years prior to his injury, Papai received various assignments with a number of different employers, including Harbor Tug, through a central union hiring hall. See id. at 1538. In fact, during the 2-1/2 months prior to his injury, Harbor Tug had employed Papai on 12 separate occasions. See id. at 1542. In attempt to establish a substantial connection to a vessel in

navigation, Papai sought to introduce evidence of his prior employments with Harbor Tug and with other employers. See id. at 1540. After rejecting the evidence relating to other employers, the Court examined Papai's specific employments with Harbor Tug. See id. at 1542. Given the fact that Papai described a number of these jobs as non-deckhand work, the Court held that "it would not be reasonable to infer" that the rest of his employments with Harbor Tug were of a seagoing nature. Id. Thus, the contacts would not seem to assist Papai in establishing seaman status. More importantly, the Court stated "in any event, these discrete engagements were separate from the one in question, which was the sort of 'transitory or sporadic' connection to a vessel or group of vessels that . . . does not qualify one for seaman status." Id.(citation omitted). Thus, the Court held that these prior assignments could not be used to establish seaman status because they were separate from Papai's present employment.

The Court of Appeals for the Fifth Circuit has addressed this question more directly in Patton-Tully Transp. Co. v. Ratliff, 797 F.2d 206 (5th Cir. 1986). In that case, Tommy Lee Ratliff worked for Patton-Tully Transportation Company from 1979 until he quit in May 1980; but he returned to the company in September 1980 and worked there until his death in March 1981. See id. at 208. Subsequently, his mother filed a claim under the Jones Act against the company, seeking to recover damages for the death of her son. See id. at 209. In evaluating Ratliff 's seaman status, the court confronted the question of whether it should consider both periods of Ratliff 's employment with Patton-Tully, or whether it only should consider Ratliff 's final period of employment with the company. The

court held that it should focus solely on Ratliff 's final period of employment, because "the four-month hiatus in Ratliff 's employment was a significant break requiring separate evaluation of his duties during the re-employment period." Id. at 210. Thus, the court upheld the exclusion of evidence of a prior employment with the same employer, because the employee had not worked for the employer on a continuous basis. See also Reeves, 26 F.3d at 1256 ("The key to the Fleet Seaman Doctrine is that the seaman maintain the employment relationship with the same employer.").

Excluding such evidence is consistent with the Fleet Seaman Doctrine. Although the doctrine developed as a means to protect employees from losing seaman status "when on temporary non-navigable assignments or when assignments preclude attachment to one," Reeves, 26 F.3d at 1256, the doctrine specifically excludes individuals who perform seaman's work on multiple vessels, but do so as part of their employment with multiple employers. See Harbor Tug, 117 S. Ct. at 1541. The distinction developed in part because each new assignment with a different employer is distinct from the employee's prior jobs with other employers, and "no principled basis" existed to limit "which prior employments are considered for determining seaman status." Id. This distinction served the purpose of permitting "employers and maritime workers alike" to predict the Jones Act status of an employee based on the job for which the employer hired the individual, rather than based on the prior experiences of the employee with an independent employer. Id.

Applying this rationale to a situation where an employment relationship is terminated and subsequently the employer

rehires the employee, the employee's posture is more akin to those excluded by the doctrine rather than those afforded protection under it. After the termination of the employment relationship, the employee severs any duties that the employee had towards the employer with respect to the performance of the former job. The employee does not have any ongoing or regular responsibilities relating to the vessels in the former employer's fleet. Upon being rehired, the employee does not recapture that prior relationship. Instead, the employee adopts a prospective set of duties and responsibilities that may be distinct from the employee's former performance, and the connections the employee once had to any vessels in the employer's fleet are thus separate from the employee's new status. In effect, the employment in the new position could be considered to be for an entirely different employer, and as such, evidence of the prior employment would have no relevance to the employee's later position with the employer. Thus, we hold that evidence of an employee's prior assignment with the same employer is not admissible under the Fleet Seaman Doctrine if those assignments were not part of a continuous employment relationship between the employer and employee. [8]

Shade severed all ties with Great Lakes and with his prior assignments with the company by working for Bean-Weeks. When Shade returned to Great Lakes after approximately ten months, his final employment only concerned the Cape May job and his duties during that dredging operation. He had no regular responsibilities that required him to move from vessel to vessel in Great Lakes' fleet; instead, he was hired for a distinct job and only could establish a connection to vessels being used at the Cape May dredging operation. Thus, because he

did not maintain a continuous employment relationship with the company, the evidence of Shade's prior employment with Great Lakes was completely irrelevant to the determination of his seaman status, and the district court abused its discretion to have admitted this prior employment history into evidence.

Because the district court abused its discretion to admit Shade's prior employment history into evidence, "we must reverse unless we find that its admission was harmless error." Lippay, 996 F.2d at 1500. An error is harmless if "it is highly probable that the error did not substantially affect" the judgment. Id. The issue of seaman status was one of the central issues at trial and was the subject of a great deal of disputed evidence. The admission of Shade's prior work history was significant, because it permitted Shade to argue to the jury that he should be considered a seaman based on the status he held during his prior employment assignments and regardless of his actual status at Cape May. During closing arguments, Shade's counsel stated:

> The Supreme Court has said that in evaluating the status of an individual, you do not look at what he was doing on the day of the injury, or even at the time of the injury. You look at Mr. Shade's history with this company Great Lakes.
>
> And if you do that, you will know that Mr. Shade has always been a seaman for Great Lakes . . . .
> And you also know that while he was on the beach [at Cape May] he was called out to

> perform functions on the sea. That is not necessary for you to find. You can find that he wasn't, and still determine he was a seaman, because, as the records will show, he has worked for Great Lakes for over four years, every time as a seaman, as a deck hand.

App. at 849. Because of the centrality of the issue and the extremely prejudicial use of this evidence, we cannot say that it is highly probable that the error did not affect the verdict.[9] Therefore, we will reverse the judgment and remand this matter for a new trial in a matter consistent with this opinion.

- - - - - - - - - - - - - - - - - - Footnotes- - - - - - - - - - - - - - - - - -

n1 In addition, the second portion of the test contains a direct measurement of time through its durational element.

n2 Great Lakes also raised a number of other issues in its appeal, such as the failure to hold a charge conference, the alleged inadequacy of the district court's jury charge, and the lack of a set-off against the judgment for the amounts Shade received under the LHWCA; however, we will not reach these issues on this appeal as their resolution could not affect our result.

n3 The Court in Wilander definitively resolved the "inconsistent use of an aid in navigation requirement" that arose between 1927 and 1946, "during which [time] the Court did not recognize the mutual exclusivity of the [LHWCA] and the Jones Act." 498 U.S. at 348, 111 S. Ct. at 814. The Court explained that "the better rule" was to define seaman status "solely in terms of the employee's connection to a vessel in navigation." Id. at 354, 111 S. Ct. at 817. This rule would ensure that the Jones Act would fulfill the purpose of protecting "all who work at sea in the service of a ship [and who] face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." Id.

n4 We note that in making this determination, we do not consider the evidence of Shade's prior employment history with Great Lakes, because as we hold below, such evidence is inadmissible, and thus cannot be considered by a court in deciding a motion for a judgment as a matter of law. See Lightning Lube, 4 F.3d at 1198-1200.

n5 Rule 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court, pursuant to statutory authority. Evidence which is not relevant is not admissible."

n6 Arguably we should exercise plenary review on the evidence issue. Of course, if we did, we would reach the same result. Thus, we do not prejudice Shade by using an abuse of discretion standard.

n7 Even if Shade's employment prior to 1992 had been with Great Lakes our result would be the same, because as we hold below, such employment evidence is not admissible if the employment relationship was not continuous.

n8 Conceivably there could be such a short interruption in an otherwise continuous employment relationship that it might be reasonable to regard the employment as practically continuous and thus to apply the Fleet Seaman Doctrine. Here, however, the interruption was not so short, and Shade worked for Bean-Weeks in the interim. These facts preclude a finding that Great Lakes' employment of Shade was practically continuous.

n9 We do not preclude admission of evidence of the character leading to the reversal here if the evidence is admitted for a purpose other than to establish an employee's seaman status. Of course, in the event that such evidence is admitted, the district court should give an appropriate instruction as to its use.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN D. SHADE
Plaintiff

v.

GREAT LAKES DREDGE & DOCK COMPANY,
Defendant

ORDER

AND NOW, this 29th day of November, 1997, upon consideration of defendant's Motion for Judgment as a Matter of Law, and Alternative Motion for a New Trial, and the response thereto, it is hereby ORDERED that the said motions are DENIED.

BY THE COURT

s/ MARVIN KATZ, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN D. SHADE

v.

GREAT LAKES DREDGE & DOCK COMPANY,

Appellant

No. 97-2023

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civ. No. 97-00739)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Jduge, and SLOVITER, STAPLETON, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and RENDELL, Circuit Judges

The petitions for rehearing filed by the appellee, John D. Shade, and appellant, Great Lakes Dredge and Dock Company, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT

s/

Dated: 9/30/98

46 USCS Appx § 688 (1998)

TITLE 46. APPENDIX. SHIPPING
CHAPTER 18. MERCHANT SEAMEN PROTECTION AND RELIEF

46 USCS Appx § 688 (1998)
§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy.
(1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United

States at the time of the incident giving rise to the action, if the incident occurred--

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources--including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention on the Contin -l Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person--

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(2)

Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

No. 98-1063

In the

Supreme Court of the United States

October Term, 1998

JOHN D. SHADE,

Petitioner,

-v-

GREAT LAKES DREDGE & DOCK COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

ROBERT BLAIR WHITE, JR., ESQUIRE
Counsel of Record
Rapp, White, Janssen & German P.C.
1800 John F. Kennedy Boulevard
Suite 500
Philadelphia, PA 19103
(215) 981-0300
Attorneys for Respondent

Appellate Service: Curry & Taylor (800) 222-8738/Appellate@webtv.com

♻

18pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

When a maritime employee receives discrete job assignments through his or her union pursuant to a collective bargaining agreement, can that employee aggregate multiple discrete prior employments with the same and other employers for the purpose of establishing the substantiality prong of the seaman status test under *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) and, as to prior discrete employments with the same employer, is it even necessary to consider the continuity of these prior discrete employments.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF CORPORATE RESPONDENT

The parent company of Respondent, Great Lakes Dredge & Dock Company is Great Lakes Dredge & Dock Corporation, a Delaware corporation.

Nonwholly owned subsidiaries of Great Lakes Dredge & Dock Company are North American Trailing Company, NATCO Limited Partnership and Amboy Aggregates Joint Venture.

TABLE OF CONTENTS

Counter-Statement of the Question Presented for Review i

List of Parent Companies and Nonwholly Owned Subsidiaries of Corporate Respondent ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Argument

I. BARRING CONSIDERATION OF DISCRETE PRIOR EMPLOYMENTS WITH THE SAME AND OTHER EMPLOYERS COMPORTS WITH *CHANDRIS, INC. V. LATSIS*, 515 U.S. 347 (1995) AND *HARBOR TUG & BARGE CO. V. PAPAI*, 520 U.S. 548, 117 S.CT. 1535 (1997) AS WELL AS THE DECISIONS OF ALL CIRCUIT COURTS OF APPEALS THAT HAVE CONSIDERED THE ISSUE; THE THIRD CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT COURT OF APPEALS 6

Conclusion 11

Appendix

Circuit Court Judgment 1a

TABLE OF AUTHORITIES

CASES

Chandris, Inc. v. Latsis,
515 U.S. 347 (1995) ..... i, 6, 7

Harbor Tug & Barge Co.
v. Papai, 520 U.S. 548,
117 S.Ct. 1535 (1997) 6, 8, 9

Patton-Tully Transportation Co.
v. Ratliff, 797 F.2d 206,
210 (5th Cir. 1986) 10

Shade v. Great Lakes Dredge
& Dock Co., 154 F.3d 143
(3d Cir. 1998) 1, 3, 5, 6

Stanfield v. Shellmaker, Inc.,
869 F.2d 521, 525
(9th Cir. 1989) 10

I

OPINIONS BELOW

The judgment of the Third Circuit Court of Appeals was omitted from petitioner's Appendix. That judgment is reproduced in the Appendix hereto at 1a. The Opinion of the Third Circuit is now reported: *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143 (3d Cir. 1998).

STATEMENT OF THE CASE

On December 9, 1994, John D. Shade ("Shade") began employment with Great Lakes Dredge & Dock Company ("Great Lakes") on a beach replenishment job in Cape May, New Jersey. Shade was a member of Local 25, Marine Division, International Union of Operating Engineers, AFL-CIO ("Local 25") and received his job assignments from Local 25. Immediately before his assignment by Local 25 to Great Lakes at the Cape May job, Shade had been assigned by Local 25 to a job with another employer, Bean-Weeks Joint Venture ("Bean-Weeks"). Shade was employed by Bean-Weeks continuously from March through November 5, 1994 on a discrete job. Prior to his employment with Bean-Weeks, Shade had been assigned by Local 25 to multiple discrete assignments with Great Lakes during the period September, 1992 to early February, 1994.

On the Cape May job, Shade had an employment-related connection to only one Great Lakes' vessel, Anchor Barge 110. Although there were other Great Lakes' vessels on the Cape May job, Shade admitted he had no employment-related connection to any of them. Shade contended that his duties on the Cape May job qualified him for seaman status. Since his only employment-related connection to a vessel on that job was with Anchor Barge 110, Shade claimed seaman status as a member of the crew of Anchor Barge 110. At trial, Shade introduced evidence that 90% of his work activities on the Cape May job involved performing ship's work aboard Anchor Barge 110. Great Lakes refuted this contention and offered evidence that Shade's performance of ship's work aboard Anchor Barge

110 was limited to a two day period at the beginning of his employment on the job.

Anticipating that Shade might improperly attempt to invoke the "fleet seaman doctrine" by introducing evidence of his prior vessel-related employments with Great Lakes and other employers, Great Lakes filed a pre-trial motion in limine to preclude Shade from offering and the district court admitting into evidence Shade's employments prior to December 9, 1994 with Great Lakes and others. The district court deferred ruling on Great Lakes' motion in limine. During his opening statement at trial, over the objection of Great Lakes, Shade was permitted to invoke the entirety of his maritime career working as a deckhand aboard vessels for multiple employers including Great Lakes. During examination and cross-examination of witnesses, over the objection of Great Lakes, Shade was permitted to elicit his prior employments with Great Lakes and others including the nature of these prior employments as ship's work aboard vessels. Finally, over the objection of Great Lakes, Shade was permitted to introduce into evidence a document prepared by Local 25 indicating Shade's employment history with Great Lakes and others from September, 1992 through March, 1994 including the designation "deckhand" for these discrete employments. Using the evidence of his prior employments with Great Lakes and others, Shade was permitted to argue to the jury that the determination of his seaman status was not limited to his activities on the Cape May job. Rather, the jury was to consider his entire maritime career much of which involved traditional seaman's work. *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 154 (3d Cir. 1998).

Contrary to his assertions on page 3 of the Petition for a Writ of Certiorari, Shade's prior employment with Bean-Weeks did not end on December 8, 1994 and he did not report to the Cape May job as a deckhand. Rather, his prior employment with Bean-Weeks ended on November 5, 1994 and he was hired by Great Lakes on the Cape May job to perform the duties of a shoreman in accordance with a requirement of the collective bargaining agreement. Similarly, Shade's assertion at page 4 of his Petition that his duties on the beach on December 30, 1994 related to the submersible pipeline is neither supported by the evidence nor logic. The submersible pipeline rested on the ocean's floor. At the point where the submersible pipeline came out of the water at the edge of the beach, it ended and the shore pipeline began. Shade's duties on the day of his injury and for the five preceding days related to the shore pipeline, not the submersible pipeline. Finally, Shade's self-serving assertion at page 4 of his Petition that, "Had he not been injured, he would have continued his employment on navigable waters," is not supported by the evidence. There was no evidence at the trial as to what work activities Shade would have been assigned had he not been injured.

In Shade's Petition, a substantial portion of the Statement of the Case is devoted to excerpts from the district court's charge (pp. 4-6). Shade ignores that the Third Circuit

did not order a new trial based on the impropriety of the district court's charge.[1] Rather, the Third Circuit ordered a new trial based on the district court's improperly admitting evidence of Shade's prior employments with Great Lakes and other employers. As to other employers, in footnote 1 of his Petition, Shade argues that the admission of his prior employments with other employers was harmless error because the district court charged that such prior employments were not proper to consider in determining Shade's seaman status on the Cape May job. That argument was properly rejected by the Third Circuit because the district court permitted Shade to argue to the jury the entirety of his maritime career, including significant employments with others, as the keystone of his seaman status contention. Further, Shade makes no effort to reconcile the contradiction in the district court permitting him to introduce evidence of his prior employments with others and arguing those prior employments to the jury while at the same time charging the jury it was improper to consider those prior employments with others.

---

[1] In addition to the evidentiary issue involving prior employments, Great Lakes' appeal to the Third Circuit included challenges to the district court's charge. Because of its ruling on the prior employments' evidentiary issue, the Third Circuit did not address any of Great Lakes' objections to the charge. 154 F.3d at 148 n.2.

ARGUMENT

I. BARRING CONSIDERATION OF DISCRETE PRIOR EMPLOYMENTS WITH THE SAME AND OTHER EMPLOYERS COMPORTS WITH *CHANDRIS, INC. V. LATSIS*, 515 U.S. 347 (1995) AND *HARBOR TUG & BARGE CO. V. PAPAI*, 520 U.S. 548, 117 S.CT. 1535 (1997) AS WELL AS THE DECISIONS OF ALL CIRCUIT COURTS OF APPEALS THAT HAVE CONSIDERED THE ISSUE; THE THIRD CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT COURT OF APPEALS

As the Third Circuit observed, the district court permitted Shade to introduce evidence of two types of prior employments: (a) with other employers and (b) with Great Lakes. 154 F.3d at 151. Shade was permitted to testify about his work activities as a deckhand aboard vessels during the entirety of his maritime career from 1974 until the time of his injury. Included among this evidence was Shade's employment as a deckhand with Bean-Weeks from March through November 5, 1994. At page 3 of his Petition, Shade concedes that most of his employments during his maritime career were with another employer ("During most of his maritime career, Shade worked for American Dredging Company"). In *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1998), 117 S.Ct. 1535, this Court held that it is improper for the factfinder to consider prior employments with other employers in determining the substantiality prong of the seaman status test. Accordingly, the Third Circuit was correct in ordering a new

trial on the basis of the district court's improperly admitting into evidence Shade's prior employments with other employers. For this reason alone, Shade's Petition should be denied.

As for Shade's prior discrete employments with Great Lakes, it is sufficient to note that the same arguments advanced by Shade here and in the Third Circuit were advanced by the maritime employee in *Harbor Tug* and rejected. As concerns the evidence to be considered by the factfinder in determining the substantiality prong of the seaman status test, *Chandris* instructs:

> [W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a workers service with a particular employer . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.

515 U.S. at 371-72.

In *Harbor Tug*, this Court explained the meaning of the above-quoted language from *Chandris* as follows:

> [T]he context of our statement in *Chandris* makes clear our meaning, which is that the employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer, an assignment with different `essential duties' than his previous ones. . . . In *Chandris*, the words `particular employer' give emphasis to the point that the inquiry into the nature of the employee's duties for seaman-status purposes may concentrate on a *narrower*, not *broader*, period than the employee's entire course of employment with his current employer.

117 S.Ct. at 1541 (citation omitted) (emphasis added). In holding that the maritime employee under consideration there could not accumulate his prior continuous employments with the same employer to establish a substantial connection to a vessel in navigation, *Harbor Tug* observed:

> [T]hese discrete engagements were separate from the one in question, which was the sort of 'transitory or sporadic' connection to a vessel or group of vessels that, as we explained in *Chandris*, does not qualify one for seaman status.

117 S.Ct. at 1542 (citation omitted).

There is no question that Shade's prior employments with Great Lakes from September, 1992 to February, 1994 were separate from his employment at Cape May. A ten month interval existed between Shade's last discrete assignment with Great Lakes and his employment on the Cape May job. Similarly, it is beyond question that Shade's essential duties on the Cape May job were different than his duties on the prior discrete jobs with Great Lakes. In his improperly admitted trial testimony, Shade testified that he performed the duties of a deckhand aboard vessels in navigable waters during these prior employments. At the Cape May job, by his own admission, Shade performed the work of a shoreman on the beach for part of the time he was employed there. Accordingly, the Third Circuit properly applied *Chandris* and *Harbor Tug* in holding that evidence of Shade's prior discrete employments with Great Lakes should not have been submitted to the jury.

Because of the holdings in *Chandris* and *Harbor Tug* that prior discrete employments with the same employer, continuous or otherwise, are not to be considered in assessing a maritime employee's substantial connection to a vessel in

navigation, it was unnecessary for the Third Circuit to consider the continuous versus non-continuous prior employment dichotomy. To the extent the Third Circuit considered it, it is significant to note that its holding is consonant with the holdings of the Fifth and Ninth Circuits, the only other courts of appeals that have considered the issue. *See Patton-Tully Transportation Co. v. Ratliff*, 797 F.2d 206, 210 (5th Cir. 1986); *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521, 525 (9th Cir. 1989). Additionally, the absence of continuity in the employments serves to emphasize the discrete nature of the employments.

The Third Circuit's holding that Shade's prior discrete employments with Great Lakes were improperly admitted into evidence is consistent with the prior decisions of this Court and the other circuit courts of appeals that have considered the issue. Accordingly, since the question presented in Shade's Petition already has been decided by this Court and there is no conflict among the courts of appeals, there is no important reason to issue a Writ of Certiorari.

CONCLUSION

For all of the reasons set forth herein, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ROBERT BLAIR WHITE, JR., ESQUIRE
Counsel of Record
Rapp, White, Janssen & German P.C.
1800 JFK Blvd., Suite 500
Philadelphia, PA 19103
(215) 981-0300

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-2023

JOHN D. SHADE

v.

GREAT LAKES DREDGE & DOCK COMPANY,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C Civ. No. 97-00739)

Present: Greenberg, Scirica and McKee, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on July 30, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Court entered November 19, 1997, be, and the same is hereby reversed and the cause is remanded to the District Court for a new trial in a matter [sic] consistent with this opinion. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

S/ P. Douglas Sisk
Clerk

Dated: 3 September 1998